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# Chapter 159: Justice for Sexual Assault Victims or Big Brother in Your Dorm Room? Expanding Surveillance on College Campuses

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## **Chapter 159: Justice for Sexual Assault Victims or Big Brother in Your Dorm Room? Expanding Surveillance on College Campuses**

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### *Code Section Affected*

Penal Code § 633.02 (new).

SB 424 (Pan); 2015 STAT. Ch. 159.

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### I. INTRODUCTION

College campuses in America are not insulated communities divorced from crime.<sup>1</sup> One of the most pervasive crimes on campuses is sexual assault.<sup>2</sup> Up to one in five undergraduate students is “a victim of an attempted or completed sexual assault,” and repeat offenders perpetrate nine out of ten assaults.<sup>3</sup> Sexual

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1. SENATE COMMITTEE ON PUB. SAFETY, COMMITTEE ANALYSIS OF SB 424, at 5 (Apr. 28, 2015).

2. *Attorney General Kamala D. Harris, UC President Janet Napolitano Take Steps to Address Campus Sexual Assault*, OFFICE OF THE ATT’Y GEN., <https://oag.ca.gov/campus-sexual-assault> (last visited Sept. 20, 2015) (on file with *The University of the Pacific Law Review*) [hereinafter “*Steps to Address*”].

3. *Id.* Research suggests “[ninety percent] of rapes at colleges are perpetrated by [three percent] of college men.” Kristina Mastropasqua, *Sexual Assault and Rape on U.S. College Campuses: Research Roundup*,

assault rates on campuses “account[] for some of the highest casualty counts in the nation.”<sup>4</sup> Despite the high frequency of sexual assaults on campuses, they are severely underreported; as many as eighty percent of victims choose not to report their assaults.<sup>5</sup> Additionally, many campuses mishandle the sexual assault cases that are reported.<sup>6</sup>

The University of California, Berkeley (U.C. Berkeley) offers illustrative examples of victims who felt dissatisfied with the campus process after reporting their sexual assaults.<sup>7</sup> Aryle Butler, a U.C. Berkeley student, suffered repeated sexual assaults from a fellow student during a summer program.<sup>8</sup> When she reported the assaults to administrators, they responded “it wasn’t their problem,” and “admonish[ed] her ‘regarding the consequences of falsely reporting sexual assaults.’”<sup>9</sup> Nicoletta Commins, another U.C. Berkeley student, was sexually assaulted in 2012 as a junior.<sup>10</sup> Commins reported the incident to both the student health center and the City of Berkeley Police Department.<sup>11</sup> U.C. Berkeley failed to investigate her sexual assault report and did not notify Commins that its investigations had ended.<sup>12</sup> Both of these women could not rely on their school to handle their sexual assault cases and instead turned to the legal system.<sup>13</sup>

The pervasiveness of campus sexual assaults has attracted national attention.<sup>14</sup> “In 2014, President Obama appointed the White House Task Force to Protect Students from Sexual Assaults” to investigate and recommend options to reduce the frequency of sexual assaults on college campuses and to improve handling sexual assault cases with repeat offenders.<sup>15</sup> California is also attempting to hold campuses more accountable by increasing reporting requirements, moving from a “no means no” consent standard to a “yes means yes” consent standard, lowering the burden of proof for sexual assaults, and,

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JOURNALIST’S RES. (Sept. 22, 2015), <http://journalistsresource.org/studies/society/public-health/sexual-assault-rape-us-college-campuses-research-roundup> (on file with *The University of the Pacific Law Review*).

4. SENATE COMMITTEE ON PUB. SAFETY, COMMITTEE ANALYSIS OF SB 424, at 5 (Apr. 28, 2015).

5. *Steps to Address*, *supra* note 2.

6. See Tyler Kingkade, *A Big Problem in How Campus Police Handle Sexual Assaults*, HUFFINGTON POST (Nov. 6, 2013), [http://www.huffingtonpost.com/2013/11/06/student-sexual-assaultpolice\\_n\\_3849948.html](http://www.huffingtonpost.com/2013/11/06/student-sexual-assaultpolice_n_3849948.html) (on file with *The University of the Pacific Law Review*) (stating that campus police mishandling a victim’s sexual assault report is a common experience among victims).

7. See Jessica Testa, *Three Students Sue UC Berkeley for Mishandling Sexual Assaults*, BUZZFEED NEWS (June 29, 2015), <http://www.buzzfeed.com/jtes/three-students-sue-uc-berkeley-for-mishandling-sexual-assault#.ufjG7QZq1> (on file with *The University of the Pacific Law Review*) (stating that three students filed suit against University of California, Berkeley regarding the way the university handled their sexual assault cases).

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. See Mastropasqua, *supra* note 3 (discussing President Obama’s appointment of a White House Task Force to take national action to prevent sexual assaults).

15. *Id.*

through Chapter 159, expanding campus police's surveillance authority by allowing campus police to wear body cameras and record students in sexual assault investigations without both party's consent.<sup>16</sup>

This Comment discusses California's current campus sexual assault scheme,<sup>17</sup> reviews Chapter 159,<sup>18</sup> and analyzes how Chapter 159 will contribute to investigation of sexual assault cases, including the role of campus police in resolving sexual assault cases that proceed to formal criminal charges and the potential concerns that may arise if campus officers are given expanded surveillance authority.<sup>19</sup> Finally, Part IV.B–C will discuss potential chilling effects on speech and invasion of privacy as well as the lack of regulation on campus police body camera usage.<sup>20</sup>

## II. LEGAL BACKGROUND

Section A will examine the current statutory scheme for handling campus sexual assaults.<sup>21</sup> Section B will discuss relevant surveillance laws, including the Invasion of Privacy Act.<sup>22</sup> Section C will explore the exceptions to the Invasion of Privacy Act and how campus police fall outside those exceptions.<sup>23</sup> Finally, Section D will address the statutes currently applicable to body cameras.<sup>24</sup>

### A. Federal and State Campus Sexual Assault Laws

Title IX, a federal law prohibiting sex discrimination in federally funded education programs and activities, states that “no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.”<sup>25</sup> Title IX, passed in 1972, did not originally provide a basis for student-to-student sexual assault claims on college

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16. *Steps to Address*, *supra* note 2; see CAL. EDUC. CODE § 67386 (a)(1) (requiring campuses receiving state funds to adopt a lower standard of affirmative consent).

17. See *infra* Part II (discussing campus sexual assault jurisprudence and regulatory schemes).

18. See *infra* Part III (showing that Chapter 159 expanded the authority of campus police by removing the all-party consent limit for sexual assault cases and body cameras).

19. See *infra* Part IV.A (discussing the role of campus police in preventing sexual assault through expanded investigations).

20. See *infra* Part IV.C (discussing the lack of regulation over campus police usages of body cameras).

21. See *infra* Part II.A (discussing campus sexual assault jurisprudence and regulatory schemes).

22. *Infra* Part II.B.

23. *Infra* Part II.C.

24. *Infra* Part II.D.

25. 20 U.S.C. § 1681; Overview of Title IX of the Education Amendments of 1972, DEP'T OF JUSTICE, <http://www.justice.gov/crt/overview-title-ix-education-amendments-1972-20-usc-1681-et-seq> (last visited Jan. 28, 2016) (on file with *The University of the Pacific Law Review*).

campuses.<sup>26</sup> In 1997, though, the U.S. Department of Education's Officer for Civil Rights (OCR) began issuing administrative guidance on Title IX's application in student-to-student sexual assaults.<sup>27</sup> Although the OCR's administrative guidelines are not promulgated rules, campuses generally adhere to them because the OCR has the authority to withhold federal funding from campuses in violation of Title IX.<sup>28</sup> In 2001, the OCR issued a memorandum requiring schools to conduct a "prompt, thorough, and impartial" investigation into any reported allegations of rape or sexual assault.<sup>29</sup> Ten years later, the OCR issued another memorandum requiring a "preponderance of the evidence" standard for all campus tribunals: "more likely than not that sexual harassment or violence occurred."<sup>30</sup> The memorandum also required that victims receive notice of their legal rights, including the right to sue the educational institution in civil court or file a complaint with the OCR.<sup>31</sup>

California's Education Code also requires college campuses receiving state funds to: (1) adopt an affirmative consent standard for campus disciplinary proceedings;<sup>32</sup> (2) adopt victim-centered policies;<sup>33</sup> and (3) enter into memoranda of understanding (MOU) with law enforcement agencies, victim services organizations, or other community service organizations.<sup>34</sup> The California Attorney General assisted colleges with implementing the MOU requirement by releasing a model MOU.<sup>35</sup> The model MOU effectuates the goals of coordination and collaboration between campuses and law enforcement agencies, and also increases transparency of campus administration and campus police responses to reports of sexual assault on college campuses.<sup>36</sup> When a campus employee or campus police officer learns of a sexual assault on campus, he or she is required

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26. Stephen Henrick, Comment, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49, 51 (2013).

27. *Id.*

28. OFF. OF CIVIL RTS., U.S. DEP'T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 52 (2001), available at <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.html> [hereinafter REVISED SEXUAL HARASSMENT GUIDANCE] (on file with *The University of the Pacific Law Review*).

29. *Id.*

30. *Id.* at 59–60; *Dear Colleague Letter: Sexual Violence*, U.S. DEP'T OF EDUC. (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> (on file with *The University of the Pacific Law Review*).

31. *Id.* at 52.

32. CAL. EDUC. CODE § 67386(a)(1) (West 2015).

33. *Id.* § 67386(b).

34. *Id.* § 67386(c).

35. *Campus Sexual Assault—General Frequently Asked Questions*, STATE OF CAL. DEP'T OF J., OFFICE OF THE ATT'Y GEN., <https://oag.ca.gov/campus-sexual-assault-general-faqs> (last visited Sept. 24, 2015) (on file with *The University of the Pacific Law Review*).

36. *Id.*

to notify the local law enforcement agency member of the MOU agreement as soon as practicably possible.<sup>37</sup>

*B. Surveillance Jurisprudence and Statutes*

In 1967, the United States Supreme Court held in *Berger v. New York* that Fourth Amendment privacy protection applies to eavesdropping devices.<sup>38</sup> The same year, in *Katz v. United States*, the Court ruled that protection doesn't require physical intrusion in order to be implicated.<sup>39</sup> Justice Harlan's concurrence implicated the Fourth Amendment when there is both a subjective and objective "reasonable expectation of privacy."<sup>40</sup> Justice Harlan's concurrence effectively replaced the majority opinion as the law, due to its clearly articulated test that courts could easily apply.<sup>41</sup> In 1971, the Court decided *United States v. White*, and concluded that White's "misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it" is not protected under the Fourth Amendment because is not a reasonable expectation of privacy.<sup>42</sup> Without White's knowledge or permission, his friend wore a wire during White's confession.<sup>43</sup> White argued that the wire violated his reasonable expectation of privacy under the Fourth Amendment, but the Court held his expectation of privacy during his confession of wrongdoing was not a *reasonable* expectation of privacy.<sup>44</sup> In justifying its holding, the Court stated that not all expectations of privacy are reasonable, and the law permits the frustration of actual expectations of privacy when they are objectively unreasonable, as White's was when he expected another person to keep his confession confidential.<sup>45</sup>

As a direct response to *Berger* and *Katz*, Congress passed Title III of the Omnibus Crime Control and Safe Streets Act (Title III), which "governs the interception and capture of wire and other specified communications."<sup>46</sup> Title III permits law enforcement and private persons to intercept communications without a warrant when one of the participants of the communication is the

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37. CAL. EDUC. CODE § 67380(a)(6)(A) (West 2015).

38. *Berger v. New York*, 388 U.S. 41, 52 (1967).

39. *Katz v. United States*, 389 U.S. 347, 350–51 (1967).

40. *Id.* at 360 (Harlan, J., concurring).

41. Peter Winn, *Katz and the Origins of the "Reasonable Expectation of Privacy" Test*, 40 MCGEORGE L. REV. 1, 7 (2009); see *Kyllo v. U.S.*, 533 U.S. 27, 44 (2001) (showing that the court cited Harlan's concurrence in *Katz* in its determinations of whether using thermal imager to detect heat waves is a search).

42. *United States v. White*, 401 U.S. 745, 749 (1971) (quoting *Hoffa v. United States*, 385 U.S. 293 (1966)).

43. *Id.* at 752.

44. *Id.* at 752.

45. *Id.* at 752.

46. Daniel R. Dinger, *Should Parents Be Allowed To Record a Child's Telephone Conversations When They Believe the Child Is in Danger?: An Examination of the Federal Wiretap Statute and the Doctrine of Vicarious Consent in the Context of a Criminal Prosecution*, 28 SEATTLE U. L. REV. 955, 957–59 (2005).

interceptor or consents to the interception, thereby extending *White's* reasoning past the informant wearing a wire, to *any* consenting party using electronic communication.<sup>47</sup> A number of states have adopted this one-party consent exception to Title III's warrant requirement.<sup>48</sup>

To counter Congress's expansion of one-party consent for eavesdropping under Title III, the California Legislature passed the Invasion of Privacy Act in 1967. The Act aimed to protect Californians' right to privacy because technological advances created a "serious threat to the free exercise of personal liberties."<sup>49</sup> The Act prohibits the use of electronic eavesdropping devices without the consent of all parties to the communication.<sup>50</sup> The all-party consent requirement contrasts with Title III's one-party consent standard by disallowing secret recordings when only one party is aware of the recording.<sup>51</sup> This goes beyond the Fourth Amendment minimum protections.<sup>52</sup> The California Legislature updated the Invasion of Privacy Act in 1992 to prohibit eavesdropping of cellphones and cordless telephones.<sup>53</sup> A violation of the Invasion of Privacy Act is "punishable by a fine, imprisonment or both."<sup>54</sup> Generally, evidence in California is admissible unless statutes provide restrictions.<sup>55</sup> The Invasion of Privacy Act also restricts the admissibility of evidence obtained in violation of the Act from being used "in any judicial, administrative, legislative, or other proceeding."<sup>56</sup>

### C. Exceptions to the Invasion of Privacy Act and Wiretapping Statutes

There are numerous exceptions to California's Invasion of Privacy Act.<sup>57</sup> California Penal Code Section 633 exempts the Attorney General, district attorneys, traditional law enforcement agencies, and those acting under the direction of these exempted groups.<sup>58</sup> Penal Code Section 633.5 allows private citizens to eavesdrop for the purpose of gathering evidence for certain crimes,

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47. See 18 U.S.C. § 2511(2)(c)–(d) (illustrating that law enforcement and private persons may intercept communications when one party to the communication is the person intercepting or gives consent to another to intercept).

48. CLIFFORD S. FISHMAN & ANNE T. MCKENNA, WIRETAPPING AND EAVESDROPPING § 5:1 (2014).

49. CAL. PENAL CODE § 630 (West 2015); see *id.* § 631 (showing that the Invasion of Privacy Act prohibited interception of wireless technology).

50. PENAL §§ 631(a), 632(a).

51. *Id.* § 631(a).

52. *Id.* § 631(a).

53. *Id.* §§ 632.5–632.7.

54. ROBERT D. LINKS, CAL. CIV. PRAC. CIVIL RTS. LITIG. § 6:17 (2015).

55. See EVID. § 351 (stating that this section "abolish[es] all limitations on the admissibility of the relevant evidence except those that are based on a statute").

56. PENAL §§ 631(c), 632(c).

57. See *id.* §§ 633–633.5 (showing the many exemptions from Penal Code Sections 631 and 632).

58. *Id.* § 633.

including “extortion, kidnapping, bribery and felonies involving violence against the person.”<sup>59</sup> Although the Invasion of Privacy Act does not allow evidence obtained through unlawful eavesdropping or recording to be admitted in court, evidence gathered under Penal Code Section 633 or 633.5 are considered lawful and may be admitted as evidence in a “judicial, administrative, legislative, or other proceeding.”<sup>60</sup> Further, when there is an exception from the Invasion of Privacy Act, the consent basis for eavesdropping defaults to federal law—Title III—and only requires one-party consent to the communication for the evidence to be admissible.<sup>61</sup>

Unlike traditional law enforcement agencies, campus police are not exempt from the Invasion of Privacy Act.<sup>62</sup> Consequently, campus police must obtain all-party consent unless they are eavesdropping for a crime enumerated in the Invasion of Privacy Act: “extortion, kidnapping, bribery and violent felonies.”<sup>63</sup> The enumeration language is unclear on whether campus police may eavesdrop and record sexual assaults with only one-party consent.<sup>64</sup>

Wiretapping is a separate basis for eavesdropping and recording.<sup>65</sup> Under Title III, states are required “to enact an enabling statute” that authorizes electronic surveillance, including wiretapping.<sup>66</sup> In 2010, Chapter 707 amended the California wiretapping statutes to their current form.<sup>67</sup> The statutes define “wiretapping” as the interception of aural transfers, which are transmissions containing a “human voice at any point.”<sup>68</sup> The statute permits traditional law enforcement officers, not campus police, to apply for court orders to wiretap.<sup>69</sup> In

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59. *Id.* § 633.5.

60. *See id.* §§ 633–633.5 (showing that these sections are not subject to the eavesdropping and recording law restrictions on evidence admissibility).

61. *See People v. Wojahn*, 169 Cal. App. 2d 135, 143 (1959) (illustrating that eavesdropping laws do not apply when there is consent of one party).

62. *See* PENAL § 633 (showing that university, college, and campus police are not included in the exempt law enforcement agencies from Sections 631 and 632).

63. *See id.* § 633.5 (explaining that nothing stops a party to a confidential communication from recording to obtain evidence for the crimes of extortion, kidnapping, bribery, and any felony involving violence against the person).

64. *See id.* §§ 631–32 (requiring consent from all parties before eavesdropping or recording); *see also id.* § 633 (noting that people under the direction of one of the exempted law enforcement authorities are also exempt).

65. *See* PENAL § 629.51 (showing that the Penal Code applies to the interception of wire communications).

66. 18 U.S.C. § 2516(2) (discussing the need for an enabling statute for intercepting electronic communications).

67. PENAL § 629.98; Complete Bill History of SB 1428, [http://leginfo.ca.gov/faces/billHistoryClient.xhtml?bill\\_id=200920100SB1428](http://leginfo.ca.gov/faces/billHistoryClient.xhtml?bill_id=200920100SB1428) (last visited Aug. 5, 2015) (on file with *The University of Pacific Law Review*). The enabling statute contains a sunset provision set to expire on January 1, 2020. PENAL § 629.98.

68. PENAL § 629.51.

69. *See id.* § 629.50 (granting the applications to wiretap to traditional law enforcement agencies, not campus police).



order to receive court orders for wiretapping, traditional law enforcement officers must describe the particular offense in detail for the authorization order, including the identity of the people whose communication will be intercepted, the type of communication sought, and the period of time the interception is authorized.<sup>70</sup> Officers are also required to demonstrate that “normal investigative procedures” will not work, are unlikely to succeed, or will likely be too dangerous.<sup>71</sup> Finally, officers may wiretap only for crimes enumerated under the wiretapping statutes.<sup>72</sup>

#### D. Limited Body Camera Laws

The Invasion of Privacy Act does not specifically mention body cameras, but it does prohibit electronic recording without the consent of all parties to the communication.<sup>73</sup> Because body cameras can be used to record video and audio of conversations, use of body cameras are likely to fall under the purview of the Invasion of Privacy Act.<sup>74</sup> Penal Code Section 633 exempts traditional law enforcement agencies from the all-party consent requirement; therefore, law enforcement officers may use body cameras as long as the officers are parties to the recorded communication.<sup>75</sup> Because campus police are subject to the Invasion of Privacy Act, they are required to obtain consent from all parties to a communication before they can record it.<sup>76</sup> Assuming that body camera footage is part of the public record, an agency has ten days after receiving a request for documents to determine whether to disclose the body camera footage as public record, or provide the person requesting it with the reasons or determinations for non-disclosure.<sup>77</sup> A few cities in California, including Rialto and San Diego, outfit police officers with body cameras to film public interactions.<sup>78</sup>

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70. See generally *id.* § 629.50 (stating the many requirements to obtain a court wiretapping order).

71. *Id.* § 629.52(d).

72. See *id.* § 629.52 (illustrating that court orders authorizing interception of wire communication require a probable cause showing of an enumerated offense).

73. See *id.* § 632 (prohibiting electronic recording of communications, even with consent).

74. See LINDSAY MILLER & JESSICA TOLIVER, IMPLEMENTING A BODY-WORN CAMERA PROGRAM: RECOMMENDATIONS AND LESSONS LEARNED 5 (2014), available at <http://www.justice.gov/iso/opa/resources/472014912134715246869.pdf> (on file with *The University of the Pacific Law Review*) (illustrating that body worn cameras record video and audio); see PENAL § 632 (stating that people face fines or prison time if eavesdrop or record confidential communications through recording device).

75. See FISHMAN & MCKENNA, *supra* note 48, at § 5:22 (explaining that one-party consent means the wiretap statute does not apply to law enforcement); see also CAL. PENAL CODE § 629.52 (West 2015) (failing to list sexual assaults as an enumerated crime means a court order for wiretapping is not available).

76. PENAL § 632.

77. GOV'T § 6253(c).

78. MILLER & TOLIVER, *supra* note 74 at 3–8.

### III. CHAPTER 159

Chapter 159 exempts Public Safety Officer Standards and Training (POST)-certified campus officers from the Invasion of Privacy Act's restrictions on eavesdropping, and other surveillance technologies, and permits POST-certified campus police to use body cameras.<sup>79</sup> This allows campus police to lawfully eavesdrop or record using practices developed prior to January 1, 1968, including one-party consent.<sup>80</sup> The exemption's scope is limited to investigations of sexual assault and other sexual offenses.<sup>81</sup> Finally, Chapter 159 also states that it should "not be construed" to affect Penal Code Section 633 and that it should "not be used to impinge the lawful exercise of constitutionally protected rights of freedom of speech, freedom of assembly, or right of personal privacy."<sup>82</sup>

### IV. ANALYSIS

Section A will discuss how the expansion of campus officers' investigation authority will contribute to the handling of campus sexual assault cases.<sup>83</sup> Section B examines concerns of chilling valuable speech and invasion of privacy, which may result from campus police officers' expanded surveillance authority.<sup>84</sup> Finally, Section C focuses on Chapter 159's lack of regulation of campus police body camera usage.<sup>85</sup>

#### *A. Expanded Investigations: An Important Piece of the Puzzle*

Chapter 159 is part of a wider effort to address how campus police and administrations handle campus sexual assaults.<sup>86</sup> Chapter 159 removes the limits on campus officers' investigation authority and provides them with more investigative tools.<sup>87</sup> One such tool is the pretext phone call: a recorded call between the victim and the suspect, usually made under law enforcement

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79. PENAL § 633.02(a) (enacted by Chapter 159).

80. *See id.* (showing that campus officers are not prohibited from recording or hearing any communications that they could do prior to January 1, 1968 in a criminal investigation for sexual assault or other sexual offense); *People v. Wojahn*, 169 Cal. App. 2d 135, 143 (1959) (stating that 1959 laws on eavesdropping and recording telephone communications did not apply when one party to a communication consented).

81. PENAL § 633.02(a) (enacted by Chapter 159).

82. *Id.* § 633.02(c) (enacted by Chapter 159).

83. *Infra* Part IV.A (discussing the role of campus police in preventing sexual assault through expanded investigations).

84. *Infra* Part IV.B (discussing whether expanded surveillance will adversely affect privacy and the exchange of ideas).

85. *Infra* Part IV.C (discussing the lack of regulation over campus police usages of body cameras).

86. *See supra* Part II.A (illustrating the laws and influences in place for handling sexual assaults).

87. *See* CAL. PENAL CODE § 633.02(a) (enacted by Chapter 159) (showing that Penal Code 631 and 632 limits on eavesdropping and recording do not apply to campus officers in sexual assault investigations).

supervision and without the suspect's knowledge that the call is being recorded.<sup>88</sup> Pretext phone calls provide some of the best evidence of sexual assaults.<sup>89</sup> Pretext phone calls are one-party consent and thus prohibited under the Invasion of Privacy Act without an exemption.<sup>90</sup> Before Chapter 159, state law was unclear about whether campus officers could use the pretext phone call strategy without a warrant.<sup>91</sup> Campus officers had to gain assistance from other law enforcement agencies who could, under the Invasion of Privacy Act exemptions, use pretext phone calls on sexual assault cases.<sup>92</sup> Chapter 159 eliminates the need for other agencies, enhancing campus officers' abilities to investigate sexual assaults effectively and quickly.<sup>93</sup> Now, an officer may employ the pretext phone call soon after receiving a sexual assault report, increasing the chance of eliciting critical evidence.<sup>94</sup>

Although Chapter 159 excuses campus police from the Invasion of Privacy Act, California's wiretapping laws do not specifically list campus police or enumerate sexual assault as a crime for which a judge may grant a wiretapping order, which leaves the law unclear as to whether campus officers have the authority to wiretap during sexual assault investigations.<sup>95</sup> This is in contrast to traditional law enforcement officers, who have the authority to eavesdrop or record in a broader range of criminal investigations.<sup>96</sup> Even if campus officers could wiretap for sexual assaults, the process to obtain a wiretap court order is rigorous.<sup>97</sup> The wiretapping statutes require officers to describe particular facts

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88. HAROLD EISENGA, USING "PRETEXT" PHONE CALLS IN SEXUAL ASSAULT INVESTIGATIONS 1 (2004), available at <https://www.ncjrs.gov/pdffiles1/nij/179946.pdf> (on file with *The University of the Pacific Law Review*).

89. ASSEMBLY COMMITTEE ON PRIVACY AND CONSUMER PROTECTION, COMMITTEE ANALYSIS OF SB 424, at 6 (July 7, 2015).

90. CAL. PENAL CODE § 630 (West 2015); see PENAL § 631 (showing that the Invasion of Privacy Act prohibited interception of wireless technology).

91. See ASSEMBLY COMMITTEE ON PUB. SAFETY, COMMITTEE ANALYSIS OF AB 992, at 6–7 (Apr. 19, 2005) (showing disagreement on campus officers' authority under Penal Code sections 631 and 632 to employ pretext phone calls).

92. See ASSEMBLY ON PRIVACY AND CONSUMER PROTECTION, COMMITTEE ANALYSIS ON SB 424, at 3 (July 7, 2015) (stating SB 424 "will enable college and university police agencies to do 'pretext' calls between victim and the alleged perpetrator").

93. *Id.*

94. ASSEMBLY COMMITTEE ON PUB. SAFETY, COMMITTEE ANALYSIS OF AB 992, at 7 (Apr. 19, 2005).

95. CAL. PENAL CODE § 629.52 (enacted by Chapter 159) (not listing sexual assault as a crime supporting a court order to wiretap).

96. Compare *id.* at § 633.5 (showing that law enforcement is exempt from Sections 631 and 632, and has no restrictions to certain crimes), with PENAL § 633.02(a) (enacted by Chapter 159) (showing that campus police are exempt from Sections 631 and 632 only for sexual assault investigations).

97. See *supra* Part II.C (illustrating numerous procedures and showings that an officer must make in order to get a wiretapping order).

and demonstrate the need to wiretap.<sup>98</sup> Even if campus police are able to wiretap, their jurisdiction is more limited than city or county police.<sup>99</sup>

Despite providing new investigation tools to campus police, Chapter 159 does not explicitly state evidence obtained in sexual assault investigations is admissible in adjudicative proceedings, such as campus disciplinary proceedings.<sup>100</sup> The language in Penal Code Sections 631 and 632 states that “no evidence obtained in violation of this section shall be admissible in any judicial, administrative, legislative, or other proceeding.”<sup>101</sup> Yet, the exceptions in Penal Code Sections 633 and 633.5 explicitly allow for evidence obtained through eavesdropping and recording to be admitted in a “judicial, administrative, legislative or other proceeding,” making Chapter 159’s silence on admissibility curious.<sup>102</sup> Due to this quirk in the statutory scheme, the admissibility of evidence gained through Chapter 159 is unclear.<sup>103</sup> However, campus officers’ actions that comply with Chapter 159 will likely comply with Penal Code Sections 631 and 632,<sup>104</sup> and it would be a strange result to allow campus officers to eavesdrop and record conversations regarding sexual assaults, while simultaneously disallow the that same evidence to be used in a “judicial, administrative, legislative, or other proceeding.”<sup>105</sup> For that reason, it is likely that evidence obtained through Chapter 159 is admissible in other proceedings.<sup>106</sup>

Assuming Penal Code Sections 631 and 632 do not exclude evidence obtained under Chapter 159, the incentive towards guilty convictions may

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98. PENAL § 629.50(a)(4) (West 2015).

99. Compare *id.* § 633.5 (completely exempting law enforcement from Sections 631 and 632), with PENAL § 633.02(a) (enacted by Chapter 159) (exempting campus police from Sections 631 and 632 only for sexual assault investigations).

100. Compare CAL. PENAL CODE §§ 631(c), 632(c) (West 2015) (showing that evidence obtained by eavesdropping and recording may not be admitted in “judicial, administrative, legislative, or other proceedings”), with PENAL § 633.02 (enacted by Chapter 159) (making no mention of the admissibility of evidence). Campus disciplinary proceedings are preferred by many sexual assault victims because of their lower standard of proof and lack of police involvement. Jill Filipovic, *Are Campus Disciplinary Hearings Really the Right Way to Try a Rape Case?*, COSMOPOLITAN (July 15, 2014) <http://www.cosmopolitan.com/politics/news/a29003/william-smith-college-rape/> (on file with *The University of the Pacific Law Review*). However, many students feel campus proceedings lack confidentiality. *Id.* Reporting sexual assaults to the police do not offer a better alternative, with higher proof requirements and low conviction rates. *Id.*

101. PENAL §§ 631–32 (West 2015).

102. See *id.* §§ 633, 633.5 (making no reference to the eavesdropping and recording law restrictions on evidence admissibility).

103. Compare *id.* § 633 (explicitly allowing for admission of evidence obtained under this provision), with PENAL § 633.02 (enacted by Chapter 159) (containing no language allowing the admission of evidence obtained under this provision).

104. See PENAL § 633.02 (enacted by Chapter 159) (stating that Penal Code sections 631 and 632 does not apply to campus officer investigating sexual assaults).

105. See *supra* Part II.C (illustrating that every other exception to Penal Code sections 631 and 632 allows admission of evidence in a “judicial, administrative, legislative, or other proceeding”).

106. See *id.* (illustrating that every other exception to Penal Code sections 631 and 632 allows admission of evidence in a “judicial, administrative, legislative, or other proceeding”).

potentially lead college administrations and campus police departments to disregard accused students' procedural rights.<sup>107</sup> Title IX incentivizes campuses to resolve sexual assault cases with guilty convictions.<sup>108</sup> The incentive exists because a college's deliberate indifference to a *victim's* claim could lead to a federal OCR violation, which puts the school at risk for loss of federal funding, while deliberate indifference towards an *accused student's* innocence does not have sex discrimination implications under Title IX.<sup>109</sup> California also implicitly favors more convictions by requiring campuses to adopt the "yes means yes" affirmative consent standard to continue receiving state funding.<sup>110</sup> The affirmative consent standard in campus proceedings results in a lighter burden of proof making it easier to resolve a campus proceeding with a guilty conviction.<sup>111</sup> In general, convictions are more likely to quell accusations that campuses are discriminating by mishandling sexual assault complaints. However, "no assault" findings fail to show whether the accused was innocent or whether the college administration's led an inadequate investigation.<sup>112</sup>

While Chapter 159 does not address procedural rights, there are other influential sources that may potentially address those rights.<sup>113</sup> Campuses that disregard an accused student's rights may face procedural due process challenges in the future.<sup>114</sup> For example, a California judge invalidated the suspension of an accused student at the University of California, San Diego.<sup>115</sup> The judge found that the campus denied the accused student his due process rights when it did not allow the student to cross-examine his accuser during the campus sexual assault hearing.<sup>116</sup>

Although the accused students' rights are an important concern, not admitting evidence that has a high likelihood of proving guilt has a net effect of

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107. Henrick, *supra* note 26, at 54.

108. *Id.*

109. *Id.* at 53–54.

110. Compare *id.* at 59–60 (showing that OCR requires campuses receiving federal funds to adopt a preponderance of the evidence standard for campus proceedings), with CAL. EDUC. CODE § 67386 (a)(1) (requiring campuses receiving state funds to adopt a lower standard of affirmative consent).

111. *Id.*; See Lani Anne Remick, Comment, *Read Her Lips: An Argument for a Verbal Consent Standard in Rape*, 141 U. PA. L. REV. 1103, 1121 (1993) (showing that a verbal affirmative consent standard may be over inclusive).

112. Henrick, *supra* note 26.

113. See CAL. PENAL CODE § 633.02 (enacted by Chapter 159) (failing to mention accused students).

114. See *Braxton v. Mun. Ct.*, 10 Cal. 3d 138, 154 (1973) (invalidating an order for failure to provide the accused student a hearing as required by constitutional due process).

115. Ashe Schow, *Judge Rules Campus Kangaroo Court 'Unfair,'* WASH. EXAMINER (July 13, 2015), <http://www.washingtonexaminer.com/due-process-win-california-judge-rules-campus-kangaroo-court-unfair/article/2568180> (on file with *The University of the Pacific Law Review*).

116. *Id.*

decreasing acquittals of defendants that are “most likely to be innocent.”<sup>117</sup> By allowing admission of evidence from previously prohibited methods, Chapter 159 will make campus proceedings more accurate and provide campus officers with more investigation tools for campus sexual assault claims.<sup>118</sup>

*B. Will Expanded Surveillance Doom Privacy and the Exchange of Ideas?*

While Chapter 159 expands campus police surveillance capacities, it also contains limiting language forbidding campus officers from using their expanded surveillance authority to impinge on individual freedom of speech, the right to assemble, and the right to privacy.<sup>119</sup> Despite the limiting language, public interest groups, like the ACLU, are concerned that campus police officers’ expanded surveillance authority will result in a chilling effect on the freedom of speech and freedom of expression, and lead to “adversarial relationships between campus police, faculty, and the student body.”<sup>120</sup> A “chilling effect” is a concern that a law “may deter potentially valuable expression.”<sup>121</sup> When there is surveillance of intellectual matters, it may lead people to avoid experimenting with “new, controversial, or deviant” ideas.<sup>122</sup> This chilling effect is especially undesirable on college campuses, which thrive on the “free exchange of views and ideas.”<sup>123</sup>

Giving campus police expanded surveillance authority also raises concerns that such authority will encourage campus police to engage in electronic surveillance inconsistent with “the expectation of privacy.”<sup>124</sup> There is a potential that increased surveillance will threaten intellectual privacy.<sup>125</sup> Intellectual privacy is the idea that people are best able to develop new ideas away from public exposure, and that there should be protection from surveillance in order to effectuate this value.<sup>126</sup> Although Chapter 159 states that it should not be interpreted to impinge on freedom of speech, assembly, and the right to privacy,

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117. See Tonja Jacobi, *The Law and Economics of the Exclusionary Rule*, 87 NOTRE DAME L. REV. 585 (2013) (explaining that not admitting evidence of people most likely to be found guilty has a net effect of decreasing the chance of acquittal of defendants that are “most likely to be innocent”).

118. See PENAL § 633.02 (enacted by Chapter 159) (failing to touch on accused students’ procedural rights while only touching upon campus officers’ expanded eavesdropping and recording authority).

119. See *id.* (showing that campus police sexual assault investigations are no longer restricted); *Id.* § 633.02(d) (enacted by Chapter 159).

120. See SENATE COMMITTEE ON PUB. SAFETY, COMMITTEE ANALYSIS OF SB 424, at 7 (Apr. 28, 2015) (illustrating the ACLU’s concerns that expanded surveillance will have a chilling effect on speech and invade the right to privacy).

121. Neil M. Richards, *The Dangers of Surveillance*, 126 HARV. L. REV. 1934, 1949 (2013).

122. *Id.* at 1935.

123. SENATE COMMITTEE ON PUB. SAFETY, COMMITTEE ANALYSIS OF SB 424, at 7 (Apr. 28, 2015).

124. *Id.* at 8.

125. Richards, *supra* note 121, at 1945.

126. *Id.* at 1945–46.

many surveillance claims will not reach the courts in the first place.<sup>127</sup> Courts have routinely dismissed suits against government surveillance for lack of standing.<sup>128</sup> For example, in *Clapper v. Amnesty International USA*, the Supreme Court held that the respondents had no standing because their fear of targeted surveillance was “highly speculative” and the threat of surveillance was not imminent.<sup>129</sup> However, it is undetermined by the courts if a plaintiff from a private college will have standing to bring a surveillance claim.<sup>130</sup> Thus, while Chapter 159’s interpretation clause provides an in court remedy, if the plaintiffs lack standing in court, the remedy is not useful in protecting intellectual privacy.<sup>131</sup>

Furthermore, there may be no legitimate privacy issues regarding the use of pretext phone calls.<sup>132</sup> In *United States v. White*, the Supreme Court held that there is no reasonable expectation of privacy in scenarios where the wrongdoer reveals information to a person who later reveals the call to law enforcement, whether recording technology is involved or not.<sup>133</sup> Applied to pretext phone calls, expecting that another person will keep communications confidential is not reasonable.<sup>134</sup>

Chapter 159 only expands campus police officers’ authority to eavesdrop and record for sexual assault investigations.<sup>135</sup> Because Chapter 159’s expansion of surveillance authority does not grant “broad powers of surveillance,” it is unlikely to have a chilling effect on speech or assembly, nor will it impinge on privacy in a meaningful way.<sup>136</sup>

### C. Body Cameras Without Appropriate Oversight

Currently, there is widespread public support for officers’ use of body cameras.<sup>137</sup> High profile use-of-force incidents are behind the push for body

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127. *See id.* at 1944 (explaining that surveillance cases are often invalidated under standing grounds).

128. *Id.*

129. 133 S. Ct. 1138, 1148 (2013).

130. *C.f. Hernandez v. Hillside*, 47 Cal. 4th 272 (2009) (holding that an employee had standing to bring an invasion of privacy claim against his private employer).

131. *Supra* Part IV.B.

132. *Infra* Part IV.B.

133. *White*, 401 U.S. 750, 752–53 (1971).

134. *Id.* at 752.

135. CAL. PENAL CODE § 633.02(a) (enacted by Chapter 159).

136. SENATE COMMITTEE ON PUB. SAFETY, COMMITTEE ANALYSIS OF SB 424, at 7 (Apr. 28, 2015).

137. *See Americans Overwhelmingly Supports Body Cams for Cops*, PRIVACY SOS (May 5, 2015, 3:38 PM), <https://privacysos.org/node/1728> (on file with *The University of the Pacific Law Review*) (showing both black and white Americans surveyed favor body cameras for police); *see also* Mike DeForest, *Police Body Camera Policies Differ*, CLICK ORLANDO (June 29, 2015, 12:58 PM), <http://www.clickorlando.com/news/police-body-camera-policies-differ/33831406> (on file with *The University of the Pacific Law Review*) (noting that many civil rights organizations and police associations have urged departments to invest in body cameras following controversial use-of-force incidents).

cameras and studies have shown promising decreases in the number of public complaints against officers and use-of-force incidents when body cameras are used.<sup>138</sup> The presence of body cameras is also associated with a civilizing effect that keeps officers and citizens on their best behavior because both know they are being recorded.<sup>139</sup> Chapter 159 allows campus officers to use body cameras with only one-party consent.<sup>140</sup> However, Chapter 159 does not provide policies governing campus officers' body camera usage.<sup>141</sup> Unlike campus sexual assault, which already has a statutory system in place, California law on body camera usage is currently sparse.<sup>142</sup>

The California legislature introduced two body camera-related bills during the 2015 Session: AB 66 and AB 69.<sup>143</sup> AB 66 failed to pass out of committee.<sup>144</sup> Governor Brown signed AB 69 into law as Chapter 461.<sup>145</sup> Both bills governed a different aspect of law enforcement officers' body camera usage.<sup>146</sup> AB 66 would have restricted an officer's authority to record and disclose footage, while also requiring that officers make a reasonable effort to notify people that they are being recorded.<sup>147</sup> Chapter 461 requires law enforcement agencies to establish policies on categorization of body camera footage and provides minimum retention periods for body camera footage.<sup>148</sup>

Allowing campus police to use body cameras but failing to regulate their usage thrusts campus police officers into the debate regarding what policies should govern body camera usage.<sup>149</sup> Although there is public agreement that

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138. See DeForest, *supra* note 137 (illustrating the push for officer use of body cameras following controversial use-of-force incidents).

139. See MICHAEL D. WHITE, POLICE OFFICER BODY-WORN CAMERAS: ASSESSING THE EVIDENCE 6 (2014), available at [https://www.ojpdagnosticcenter.org/sites/default/files/spotlight/download/Police\\_Officer\\_Body-Worn\\_Cameras.pdf](https://www.ojpdagnosticcenter.org/sites/default/files/spotlight/download/Police_Officer_Body-Worn_Cameras.pdf) (on file with *The University of the Pacific Law Review*) (showing that there is anecdotal support for the civilizing effect).

140. Compare CAL. PENAL CODE § 632(a) (West 2015) (prohibiting electronic recording of communications without the consent of both parties), with PENAL § 633.02 (enacted by Chapter 159) (showing that Penal Code section 632 does not apply to Chapter 159 for the use of body cameras).

141. See PENAL § 633.02 (enacted by Chapter 159) (failing to specify any policies on how body cameras should be used or operated).

142. *Supra* Part II.B–C.

143. AB 66, 2015 Leg., 2015–2016 Sess. (Cal. 2015) (as amended on May 6, 2015); AB 69, 2016 Leg., 2015–2016 Sess. (Cal. 2015) (as enacted on Oct. 3, 2015).

144. Current Bill Status of AB 66, [http://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill\\_id=201520160AB66](http://leginfo.legislature.ca.gov/faces/billHistoryClient.xhtml?bill_id=201520160AB66) (last visited Oct. 18, 2015) (on file with *The University of Pacific Law Review*).

145. AB 69, 2015 Leg., 2015–2016 Sess. (Cal. 2015) (as enacted on Oct. 3, 2015).

146. Compare AB 66, 2015 Leg., 2015–2016 Sess. (Cal. 2015) (as amended on May 6, 2015) (containing provisions governing when officers may record or disclose footage), with AB 69, 2015 Leg., 2015–2016 Sess. (Cal. 2015) (as enacted on Oct. 3, 2015) (containing provisions controlling the handling of body camera footage).

147. See AB 66, 2015 Leg., 2015–2016 Sess. (Cal. 2015) (as amended on May 6, 2015) (containing no provision requiring officers to record certain situations).

148. AB 69, 2015 Leg., 2015–2016 Sess. (Cal. 2015) (as enacted on Oct. 3, 2015).

149. See Henry Gass, *Body Camera Video is Coming, But Who Gets to Watch It?*, CHRISTIAN SCI. MONITOR (July 16, 2015), <http://www.csmonitor.com/USA/Justice/2015/0716/Body-camera-video-is-coming->



officers should use body cameras, there is controversy and debate on what policies should govern their use.<sup>150</sup> The two perceived benefits of body cameras are accountability and transparency.<sup>151</sup> Campus police policies should balance the need to be open and transparent with the public against the dangers that recording and disclosing body camera footage poses to privacy.<sup>152</sup> Campus police should take this balancing into account when they determine the procedures for when officers should record, how the footage should be stored, and when to disclose footage to the public.<sup>153</sup>

## V. CONCLUSION

Chapter 159 removes the eavesdropping and recording restrictions on campus officers in their campus sexual assault investigations.<sup>154</sup> There are concerns that the current statutory system for handling campus sexual assault may be problematic for accused students' rights by allowing evidence from previously unavailable investigation methods and could have a chilling effect on the freedom of speech, the right to assemble, and the right to privacy.<sup>155</sup> Moreover, the lack of body camera laws requires campus police departments who use body cameras to carefully consider what policies to adopt while the laws are still developing.<sup>156</sup>

Chapter 159 does not deal with the issues underlying the high rates of campus sexual assaults.<sup>157</sup> Nor does Chapter 159 deal directly with the reasons behind the accusations and resulting investigations of universities and college campuses for mishandling sexual assault cases under Title IX.<sup>158</sup> Chapter 159 is crafted in a way that appears to avoid controversy, considering that: (1) it only expands campus police surveillance expansion to sexual assault cases; (2) it does

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but-who-gets-to-watch-it (on file with *The University of the Pacific Law Review*) (showing that there is disagreement about what the transparency and accountability balance for body cameras policies should look like).

150. *Id.*

151. *Considering Police Body Cameras: Developments in the Law*, 128 HARV. L. REV. 1794 (2015).

152. See Grant Rodgers, *Public Body Camera Footage has a Downside, Police Say*, DES MOINES REGISTER (July 3, 2015), <http://www.desmoinesregister.com/story/news/crime-and-courts/2015/07/03/body-camera-public-footage-crimes-first-amendment/29680705/> (on file with *The University of the Pacific Law Review*) (noting that department has to make a case-by-case calls that balances openness with privacy when disclosing footage to public); see also Gass, *supra* note 149 (showing agreement by all sides of the debate that privacy concerns must be balanced with public accountability).

153. See MILLER & TOLIVER, *supra* note 74, at 12, 15 (showing that footage disclosure decisions have significant privacy implications).

154. CAL. PENAL CODE § 633.02(a) (enacted by Chapter 159).

155. *Supra* Part IV.A–B.

156. *Supra* Part IV.C.

157. See PENAL § 633.02 (enacted by Chapter 159) (focusing only on campus police capability to investigate sexual assaults).

158. *Id.*

not affect Penal Code section 633; and (3) it does not impose upon free speech, assembly, or privacy.<sup>159</sup> However, the limited scope of Chapter 159 does not limit its importance.<sup>160</sup> Chapter 159 brings campus policing more in line with traditional law enforcement, granting campus police the same investigatory powers for sexual assaults and body camera usage.<sup>161</sup> Chapter 159 is an important step towards the resolution of campus sexual assault cases, despite unresolved policy concerns.<sup>162</sup>

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159. *Id.*

160. *See supra* Part IV.A (showing the limited expansion of the law).

161. *Compare* PENAL § 633 (West 2015) (explicitly allowing for the admission of evidence obtained under this provision), *with* PENAL § 633.02 (enacted by Chapter 159) (containing no language allowing for the admission of evidence obtain under this provision).

162. *Supra* Part IV.A.